(1) 312 Sup. Ct. 42

AUG 28 1941

CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 561.

STEAMTUG "S. & H. No. 2" INC., as owner of the Steamtug "S. & H. No. 2",

Respondent-Libellant,

—against—

Steamtug "LACKAWANNA", MARGARET A. JAMISON and MARTHA A. JAMISON, co-partners doing business as Jay Street Terminal, claiming as charterers of tug "Lackawanna",

Claimants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

OSCAR R. HOUSTON,
Proctor for Petitioners,
No. 99 John Street,
New York City.

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Claimants-Petitioners.

THE PETITION OF MARGARET A. JAMISON AND MARTHA A. JAMISON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement.

This petition is brought to review that part of the decision of the Circuit Court of Appeals which modifies the decision of the District Court and holds the Steamtug "Lackawanna" solely liable for damage which resulted from a collision occurring in the East River on the early morning (about 2 A. M.) of February 26, 1938 between

a carfloat in tow alongside of the tug "Lackawanna" and the port bow of the tug "S. & H. No. 2".

The facts are fully stated in the opinions below. So far as material here they may be briefly summarized as follows: Until shortly before the collision both tugs were proceeding up the East River with the "Lackawanna" slightly astern and to port of the "No. 2". When about opposite Pier 21, Manhattan, the "No. 2" turned to port and continued this turn until she was angling downstream. As a result of this maneuver and the continued forward progress of the "Lackawanna", the bow of the "No. 2" came into contact with the bow of the float which was in tow alongside the "Lackawanna".

Decisions Below.

The District Court held that the situation of the vessels at the time of the collision was one of special circumstances (D. C. Op. R., p. 126) and that both vessels were at fault for failing to maintain a proper lookout (D. C. Op. R., p. 128). Libellant, accordingly, was granted a recovery of one-half of the damage sustained by its tug "S. & H. No. 2".

The Circuit Court of Appeals accepted the finding that both tugs had failed to maintain proper lookouts, but held that at the time of the collision the vessels were in an overtaking situation and the "Lackwanna", as the overtaking vessel, was solely at fault for not keeping clear of "S. & H. No. 2" (R., pp. 138, 139).

It disposed of the District Court's finding that "S. & H. No. 2" was at fault for not maintaining a proper lookout by holding that since "S. & H. No. 2" was the overtaken vessel, she was not required to maintain a lookout in so far as the movements of the overtaking vessel were concerned (R., p. 139).

The Question Presented.

Does the fact that a vessel is an overtaken vessel in an overtaking situation relieve her from the duty imposed upon all vessels of maintaining a proper lookout at all times; and, specifically, may the overtaken vessel change her course more than 90° without maintaining any lookout for other vessels in her vicinity?

Statutory Provisions Involved.

The rights and duties of vessels navigating the inland waters of the United States are governed by the provisions of Title 33, Chapter 3, 33 U. S. C. A., Sections 151-231. The particular provisions involved in the present case are Article 24 (33 U. S. C. A. Sec. 209) which provides that

> "every vessel, overtaking any other, shall keep out of the way of the overtaken vessel";

and Rule VIII of Article 18 (U. S. C. A. Sec. 203), which provides that if the overtaking vessel wishes to pass the vessel ahead, she must blow appropriate signals and await an answer. This Rule concludes as follows:

> "The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

The foregoing must be read in connection with Article 21 (33 U. S. C. A. Sec. 206) which reads as follows:

> "Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

Another section to be considered in this connection is Article 29 (33 U. S. C. A. Sec. 221) which reads as follows:

> "Usual additional precautions required generally. Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 102.)"

Reasons for Allowance of Writ.

I. The decision of the Circuit Court of Appeals is in conflict with the following decisions of this court holding not only that an overtaken vessel must maintain a proper lookout but that all vessels must maintain a proper lookout at all times.

> *The Illinois*, 103 U. S. 298, at 299;
> *The Ariadne*, 80 U. S. 475, 478, 479;
> *The New York*, 175 U. S. 187 at 204.

In the case of *The Ariadne, supra,* speaking of the importance of maintaining a vigilant lookout in the crowded waters of New York Harbor, this Court said (p. 479):

> "Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In the case of *The Illinois, supra*, in holding an overtaken vessel at fault for failure to maintain a lookout, this Court said (p. 299):

> "While a man stationed at the stern as a lookout is not at all times necessary, no vessel should change her course materially without having first made such an observation in all directions as will enable her to know how what she is about to do will affect others in her immediate vicinity."

II. The decision of the Circuit Court of Appeals is in conflict with the following decisions of the Circuit Courts of Appeals in other circuits, holding that an overtaken vessel must maintain a proper lookout.

SIXTH CIRCUIT:

Robinson v. *Detroit & C. Steam Nav. Co.*, 73 Fed. 883 at 892;

NINTH CIRCUIT:

Larsen v. *Portland California S. S. Co.*, 66 F. (2d) 326, 330.

III. This is not an isolated decision, but is the last in a series of decisions by which the Circuit Court of Appeals for the Second Circuit has extended the privilege of an overtaken vessel. The course of the decisions may be traced by reference to the following cases decided by the same court, which are discussed in the brief submitted herewith:

Long Island R. R. Co. v. *Killien*, 67 F. 365;
N. Y. Central No. 28, 258 F. 553;
Transfer No. 8, 25 F. (2d) 628;
Merrill C. Hart, 188 F. 49;
Industry, 29 F. (2d) 29;
Holly Park, 39 F. (2d) 572.

Under the present decision all limitations on the privilege of the overtaken vessel appear to have been removed, and the overtaken vessel may completely reverse her course without being subject to the ordinary rules as to lookout. We submit that the privilege in question, when carried to this extreme, constitutes a serious danger to navigation, particularly in the crowded waters of New York Harbor.

IV. The decision rests on an erroneous interpretation of the provisions of U. S. Code, Title 33, Chapter 3, Sections 203, 206, 209 and 221, regulating the rights and duties of overtaking and overtaken vessels.

Under Article 24 (33 U. S. C. A. §209) the overtaking vessel is required to keep out of the way of the overtaken vessel. Article 21 (33 U. S. C. A. §206) provides that, whenever one vessel must keep out of the way, the other shall keep her course and speed. Rule VIII of Article 18 (33 U. S. C. A. Sec. 203) provides that the overtaken vessel must not attempt to cross the bow of the overtaking vessel. The Circuit Court of Appeals in its decision in this case gives no effect to the foregoing statutory provisions but follows its previous decision in the *Industry*, *supra*, that these statutory provisions do not apply until after an exchange of signals between the two vessels.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 269, October Term, 1940:

STEAMTUG "S. & H. No. 2" INC., as owner of the Steamtug "S. & H. No. 2",

Libellant-Appellant,

—against—

Steamtug "LACKAWANNA", MARGARET A. JAMISON and MARTHA A. JAMISON, co-partners doing business as Jay Street Terminal, claiming as charterers of tug "Lackawanna",

Claimants-Appellees,

and that the said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, insofar as the same holds the tug "Lackawanna" solely liable for the damage sustained by the tug "S. & H. No. 2", and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

MARGARET A. JAMISON and
MARTHA A. JAMISON,

By OSCAR R. HOUSTON,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941.

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STEAMTUG "S. & H. No. 2" INC., as owner of the Steamtug "S. & H. No. 2",

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Claimants-Petitioners.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals was filed on May 12, 1941 and appears in this record (R., pp. 137-139). It is reported at 119 F. (2d) 666.

The opinion of the District Court was filed on May 23, 1939, but is not officially reported. Its findings of fact and conclusions of law are contained in the opinion (R., pp. 120-128).

Jurisdiction.

The facts are fully stated in the petition. This is a suit within the Admiralty and Maritime jurisdiction of

the United States and of this Honorable Court. Jurisdiction of this court is invoked under Article 3, Section 2, of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Title 28, Chapter 9, Section 347, U. S. Code).

Specification of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following respect:

In that the Circuit Court of Appeals modified the decision of the District Court by holding the tug "Lackawanna" solely liable for the damage sustained by the tug "S. & H. No. 2", and erred in holding that the tug "S. & H. No. 2", as an overtaken vessel, was not required to maintain a lookout at any time while making a radical change of course.

Argument.

No requirement is more rigidly enforced in admiralty courts than that a vessel must at all times maintain a proper lookout. This court in the case of *The Ariadne*, 80 U. S. 475, at 478-479, has thus stated the rule:

> "The waters near the city of New York are at all times crowded with shipping. Navigation there is not unlike the traveller threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property

and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In *The New York*, 175 U. S. 187, at 204, this court in commenting on the failure of the officers of a ship to observe another vessel, said:

> "Her officers failed conspicuously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout."

In the present case it is admitted that neither the stern lookout nor the pilot at the wheel of "S. & H. No. 2" saw the "Lackawanna" until she was within 300 feet, although the vessels just before the collision were approaching each other almost head on.

Not only has this Court held that a proper lookout must be maintained at all times by all vessels, but it has specifically applied this rule to the case of an overtaken

vessel. See passage quoted from *The Illinois*, 103 U. S. 298 (*supra*, p. 5).

That the change of course of "S. & H. No. 2" was material cannot be doubted since she had changed from a course going directly upstream to one in which she was going slightly downstream. Under the decision of this Court in the case of *The Illinois* those on board "S. & H. No. 2", before she made such a radical change in her course, should certainly have made "such an observation in all directions" as would enable her to know that what she was about to do would not have any dangerous effects on herself or on other vessels navigating in her vicinity.

Not only has this Court required the overtaken vessel to take the precaution, dictated by plain common sense, of looking all around before making any radical change of course to either side, but the Circuit Courts of Appeal in other Circuits have held the overtaken vessel to a similar eminently sensible requirement.

The Circuit Court of Appeals for the Sixth Circuit in the case of *Robinson* v. *Detroit & C. Steam Nav. Co.*, 73 Fed. 883, held in an overtaking situation that the overtaken tug was at fault for making a change of course to starboard without looking astern before making her change of course. It said at page 892:

> "* * * and it is probable that if she had had a lookout, whose only duty it would have been to look up and down the river, to observe whether the passage across the river was free, he would have seen the lights of the 'Mackinaw', and the collision would have been avoided.
>
> * * *
>
> Before the execution of such a maneuver as the tug proposed to carry out, it would have been the duty of a lookout upon the tug to look up and down the river in the usual path of vessels at that point."

In the case of *Larsen et al.* v. *Portland California S. S. Co. et al.*, 66 F. (2d) 326 at 330, the Circuit Court of Appeals for the Ninth Circuit affirmed a decision of the lower court holding the "Orient", the overtaken vessel, solely at fault in a collision with the "Admiral Nulton", the overtaking vessel, in which the "Orient" made a radical change of course of 90° to the left, liability of the overtaken vessel arising

> "because of the fault of the 'Orient' in making a sudden, unexpected and unnecessary change of course to the left without observing the approach of the 'Admiral Nulton', without warning and without posting a lookout who could observe whether such a change could be safely made."

In the foregoing cases the overtaken vessel was held to the reasonable requirement *before* making a change of course across the path of any vessels coming toward her, of looking astern to see that any such change of course would not imperil herself or any vessel coming toward her. In the case at bar, however, not only did the Circuit Court of Appeals for the Second Circuit hold that the overtaken vessel was not required to look around *before* making the radical change of course which she did, but it held still further that the overtaken vessel was not bound to maintain a lookout at any time thereafter, even though the vessel proceeded for a distance of some 400 feet across such a normally crowded thoroughfare as the East River, and directly across the courses of any vessels coming up or going down the river. The court also absolved the overtaken vessel from any duty of looking ahead, although, she was making a change of course of more than 90°.

The Circuit Court of Appeals for the Second Circuit stands alone in thus granting to an overtaken vessel the right to change her course, no matter how radically, not

only without being required to look astern before making such a change of course, but without looking around at any time thereafter, no matter what the new heading of the overtaken vessel may be.

Not even in this Circuit have other privileged vessels been granted any such right. Thus, in its decision in the case of *The Salutation*, 79 F. (2d) 609, the Circuit Court of Appeals for the Second Circuit held the privileged vessel in a crossing situation at fault for failing to maintain a proper lookout. The fact that the tug "Salutation", which was the privileged vessel in that case, was also proceeding across the same East River, which the court very properly described as "crowded waters", in which the tug while proceeding across the river "might encounter upbound vessels not then visible", was an added reason for holding the privileged vessel at fault for not maintaining a proper lookout.

In the case of *The Salutation* the court also invoked the principle laid down by the same court in the case of *The Madison*, 250 Fed. 850, that the failure to maintain a proper lookout was equivalent to the violation of the provisions of a statute, thereby putting upon the offender the burden of establishing not only that the violation did not, but that it could not have contributed to the collision. *The Pennsylvania*, 19 Wall. 125, 137, 138. The fact that the tug "Salutation" was the privileged vessel was not deemed sufficient in the court's opinion to discharge her from the duty of maintaining a proper lookout downstream as she proceeded across the river, nor was it sufficient to relieve her from the burden of establishing that her failure to maintain a proper lookout not only did not, but could not have contributed to the collision.

It is only in the case of an overtaken vessel that the Circuit Court of Appeals for the Second Circuit has thus relieved the privileged vessel from the duty not only of keeping her course and speed, but also from the duty of

maintaining a proper lookout; and this rule has only prevailed in recent years.

In its earlier decisions, *e. g.*, in *Long Island R. R. Co.* v. *Killien*, 67 Fed. 365, and *The New York Central No. 28*, 258 Fed. 553, the Circuit Court of Appeals for the Second Circuit applied the general rule that the overtaken vessel must hold her course and speed. In both of the cases cited the overtaken vessel was held at fault for making a change of course.

Thereafter, in the cases of *The Merrill C. Hart*, 188 F. 49, and *The M. J. Rudolph*, 292 Fed. 740, the same court held that the overtaken vessel was not only privileged to make any change of course, no matter how abrupt, but that she could do so without being required to look astern.

In the case of *The Transfer No. 8*, 25 F. (2d) 628, the court reverted to its earlier rule and held that even in an overtaking situation the overtaken vessel is not justified in changing her course without looking astern to see that such change of course would not be dangerous.

In the case of *The Industry*, 29 F. (2d) 29, the attention of the Court was called specifically to the fact that since under Article 24 (33 U. S. C. A. Sec. 209) the overtaking vessel was required to keep out of the way of the overtaken vessel, then under Article 21 (33 U. S. C. A. Sec. 206) the overtaken vessel was under the duty of keeping her course and speed and that under Rule VIII of Article 18 (33 U. S. C. A. §203) she was forbidden to cross the bow of the overtaking vessel. The decision of the court with respect to these clear statutory provisions was that they did not come into operation or have any binding effect on the overtaken vessel until after an exchange of signals, such as provided for under Rule VIII, had taken place. Under the court's interpretation of the rules, the overtaken vessel is under no obligations until after a whistle exchange has

taken place; but prior to such exchange she has, nevertheless, all of the privileges accorded by the rules. In other words, before the whistle exchange she has all the privileges and none of the burdens of an overtaken vessel.

Since an exchange of signals under Rule VIII is required only in case the vessel astern "shall desire to pass" the vessel ahead, it would follow that if the vessel astern did not desire to pass and for that reason sounded no whistles, then under the decision of the Court in the *Industry* the vessel ahead would have the right to change her course or speed without looking astern and would not be held to any duty whatever with respect to the vessel astern, as the Court described it (pp. 30-31):

> "while it remains possible for the overtaking vessel by proper navigation to accommodate herself to a change in course or speed of the vessel ahead."

But if the overtaken vessel does not maintain a lookout, how can she determine when the point is reached at which the overtaking vessel can no longer avoid collision unaided?

This same question is presented by the decision in the present case, which was as follows (R., p. 139):

> "The 'S. & H. No. 2' had the right to rely on her privilege and was not bound to look behind her or to take any steps to avoid a collision by the 'Lackawanna' unless, after seeing the latter, it became apparent that without precautions on the part of the 'S. & H. No. 2' a collision could not be avoided."

The Court, however, also held (R., p. 138):

> "The 'S. & H. No. 2' did not notice the approach of the 'Lackawanna' until it was too late to avoid a collision between the libellants' tug and the carfloat unless the 'Lackawanna' was under sufficient control to keep out of the way."

Since the "S. & H. No. 2", because of her failure to maintain a lookout, did not notice the approach of the "Lackawanna", she was, of course, unable to determine whether the "Lackawanna" was under sufficient control to keep out of the way or at just what time the need for taking action by the "S. & H. No. 2" first arose.

Although certiorari was applied for in the case of the *Industry*, this Court denied the application (279 U. S. 837).

Following its decision in the case of the *Industry*, the Circuit Court of Appeals for the Second Circuit has from time to time added still further to the privileges granted to the overtaken vessel by holding not only that she is not required to keep her course, but also that she is not required to keep her speed. This decision was made in the case of *The Holly Park*, 39 F. (2d) 572, in which the court also reaffirmed its previous decisions that the overtaken vessel was not required to look astern before making any change of course.

CONCLUSION.

We, therefore, submit that the decision of the Circuit Court of Appeals should be reviewed because of the conflict between this decision and the principles laid down in the decisions of other circuits, and of this Court, and because of the importance of establishing uniformity in the interpretation of the Federal statutes regulating the rights and duties of vessels in overtaking situations.

Respectfully submitted,

OSCAR R. HOUSTON,
Proctor for Petitioners.

No. 561.

IN THE

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Claimants-Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES A. MARTIN,
Proctor for Respondent.

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IN THE

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Claimants-Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Steamtug S. & H. No. 2, Inc., (Libelant below) in opposition to the petition for a writ of certiorari, respectfully shows to this Court:

The petition should be denied because it raises no novel question of law; it involves no substantial or disputed Federal question, and the determination sought to be reviewed is not inconsistent with the decisions of this Honorable Court, nor with the decisions of the Circuit Court of Appeals for the Second or other Circuits. The decision is but another in the long line of holdings that an overtaking vessel which has not signalled, is bound to hold

sufficiently under control to guard against expectable changes of course on the part of the vessel ahead. The latter is permitted to navigate under the assumption that the following vessel will comply with her legal obligation. This assumption prevails at least until such time as the vessel ahead has some reasonable ground to assume that the overtaking vessel has violated her obligation to such extent that she alone is not able to avoid collision.

POINT I.

The Circuit Court of Appeals properly held petitioners' vessel solely at fault.

Contrary to petitioners' argument, the decision under discussion is in no sense a departure from the rule, no where more rigidly enforced than in the Circuit Court of Appeals for the Second Circuit, that a vessel must maintain a proper and diligent lookout.

The case, as presented to the Circuit Court of Appeals, involved a question of fact as to whether the vessels were in an overtaking situation or in one of special circumstances. (cf. Opinion, R. pp. 137, 138.)

It does not appear that petitioners challenge the unfavorable determination made against them.

Having found as a fact that the petitioners' tug "Lackawanna" was moving up astern of respondent's tug, "S. & H. No. 2" from a direction more than 2 points abaft her beam, thus coming within the provisions of Article 24 of the Pilot Rules for Inland Waters (R. pp. 138, 139), the Circuit Court of Appeals held petitioners' tug solely at fault on the authority and reasoning of various of its previous decisions.

The arguments which petitioners now raise with respect to the duty of the lookout on the vessel ahead to look for vessels astern before the vessel ahead may make a normal and expectable swing to reach her pier (which respondent's vessel did here), were fully considered by the Circuit Court of Appeals in *The Industry*, 29 F. (2d) 29, Cert. denied 279 U. S. 837 and in the *M. J. Rudolph*, 292 Fed. 740, both cited in its opinion in this case.

In *The Industry, supra,* the Court held that in the absence of any signal from the vessel astern, evidencing a desire or intention on the part of the latter to pass her, the leading vessel may change her course so long as she has no reason to believe that the follower has violated its obligation to such an extent that the change which the leader is required to make to go about her business will involve risk of collision.

In that decision the Court followed the decision of this Court in *Thompson* v. *The Great Republic*, 23 Wall. 20, 23 L. Ed. 55, and pointed out that cases decided since *The Great Republic, supra,** which appeared to reach a different conclusion, were, on their own facts, proper exceptions to the rule.

In *The Industry* the Court recognized the difference in the duties of vessels where the following vessel has sounded signals indicating her intention to pass and where the following vessel has not sounded a signal thereby presumably evidencing an intention to remain astern, and sufficiently far astern, to adopt herself to a change of course by the vessel ahead.

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* These include *Long Island Railroad* v. *Killien*, 67 Fed. 365; *New York Central "No. 28"*, 258 Fed. 533; *The Transfer "No. 8"*, 25 F. (2d) 628; *Robinson* v. *Detroit etc. Co.*, 73 Fed. 883, cited by petitioner.

The situation in the case at bar was one in which petitioners' vessel, following respondent's, had not signalled an intention to pass.

To the reasoning of the Circuit Court of Appeals in *The Industry, supra,* may be added the thought that adoption of petitioners' argument that the vessel ahead should be under greater obligation, would constitute placing upon the leading vessel the duty of ascertaining, *at her peril,* the nature of the vessel astern, her ability to maneuver promptly, the vigilance of her officers and all other details which a navigator would be required to take into consideration before reaching a conclusion whether the following vessel was sufficiently far astern to avoid collision, if the leader should make such change of course as required to reach her destination. The difficulty of doing so at night, when little information as to the size and type of the following vessel can be learned from the appearance of her lights, is readily apparent.

In this case, as the Court held, the turn made by the respondent's tug "was a customary, if not necessary, step in approaching the foot of Roosevelt Street, and in no way excused the "Lackawanna" for crowding on the course of the "S. & H. No. 2" (R. p. 138). The master of petitioners' vessel admitted that there is nothing unusual about a tug proceeding up the East River on the flood tide, intending to land at a pier on the New York shore, turning as did respondent's tug; that she should do so, and that he would expect her to do so (R. p. 58).

Where the change of course by the leading vessel is totally unexpected, as in a situation where vessels are proceeding through a channel with neither piers or anchorages on either side, a different result is reached (cf. *Ocean SS. Co.* v. *U. S.,* 39 F. (2d) 553).

Thus, the cases do not turn on the duties of the lookout on the leading vessel. They rest on her right to assume, in the absence of notice to the contrary, that the following vessel, aware of her own capabilities, has taken such precaution that she can maneuver to avoid the changes of course the leader may reasonably be expected to make.

That a lookout astern is not required on a vessel moving ahead has long been the rule. *The Merrill C. Hart*, 188 Fed. 49.

Petitioners cite no case to the contrary.

Where the facts show and the Court finds that the following vessel has come up so close as to make danger of collision apparent, the leading vessel is at fault if she turns. *The K. V. Judge*, C. C. A. 2nd. 68 F. (2d) 710. In the instant case the Court held that there was nothing about the position of petitioners' vessel to indicate to respondent's tug that it would be unsafe to turn (R. p. 139).

Thus, it is self-evident that the case has been properly decided.

POINT II.

The decision is not in conflict with decisions of this Court or other Circuit Courts.

As previously stated, the decision under discussion follows *The Industry, supra*, which in turn follows the decision of this Court in *Thompson* v. *The Great Republic*, 23 Wall. 20, 23 L. Ed. 55. It is not in conflict with *The Illinois*, 103 U. S. 298, the *Ariadne*, 80 U. S. 475; *The New York*, 175 U. S. 187; *Robinson* v. *Detroit & C. Steam Nav.*

Co., 73 Fed. 883 or *Larsen* v. *Portland California Steamship Co.*, 66 F. (2d) 326, as petitioners maintain.

In *The Industry, supra,* the Court pointed out that *The Illinois, supra,* involved a case of a steamer overhauling a schooner which was close hauled. The steamer had turned to go under the schooner's stern when the latter unexpectedly broke her tack and came over into the steamer's course. The vessels were governed by different navigation rules than are applicable to the situation of two steam vessels as here involved.

The Ariadne, supra, involved a collision between a steamer and a sailing vessel not in an overtaking situation.

The vessels involved in *The New York, supra,* were not in an overtaking situation.

In *Larsen* v. *Portland-California Steamship Co., supra,* whistle signals had been sounded by the overtaking vessel, which was not so in the case at bar. Moreover, the leading vessel made an abrupt turn in a channel where a change of course was not to be anticipated. This case is in the same class with *Ocean SS. Co.* v. *U. S., supra,* wherein the Circuit Court of Appeals for the Second Circuit recognized the proposition that an unexpected turn, not in the ordinary course of customary navigation, is not to be anticipated by the following vessel.

In *Robinson* v. *Detroit & C. Steam Nav. Co., supra,* the vessel ahead made her change of course at a time when the following vessel was so close as to make it apparent to the leading vessel that her maneuver involved danger.

As already stated, the Circuit Court of Appeals has held in the instant case that there was nothing about the position of petitioners' vessel prior to the commencement of

the turn by respondent's tug, which would or should have made it apparent to those on board that the maneuver involved danger.

The record herein leads to the inescapable conclusion that this collision was due solely to the failure of the lookout on petitioners' tug to observe or to report to his captain what he observed with respect to the change of course by the "S. & H. No. 2" and that if petitioners' lookout had complied with the obligations imposed upon him by the decisions petitioners cite, this collision would not have occurred.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

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